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Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

MURRAY CITY, a Municipal
Corporation of the
State of Utah,
Plaintiff-Respondent,

vs.

BOARD OF EDUCATION OF
MURRAY CITY SCHOOL
DISTRICT, a Municipal
Corporation of the
State of Utah,
Defendant-Appellant.

FILED
JUN 5 - 1964

Supreme Court, Utah

Case No.
10060

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District
Court for Salt Lake County, Utah
Hon. A. H. Ellett, Judge

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UNIVERSITY OF UTAH

OCT 7 1966

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Defendant-Appellant.

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RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to recover delinquent sewer charges. The Defendant counterclaimed seeking a declaratory judgment that it was exempt from the payment of the charges.

DISPOSITION IN LOWER COURT

The case was tried on a stipulation of facts and judgment rendered for the Plaintiff for charges to September 30, 1963 in the sum of \$8,593.25.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal and a judgment stat-

ing the School District is exempt from payment of sewer service charges.

STATEMENT OF FACTS

The Plaintiff is a municipal corporation and a second class city owning and operating a sewer system within its corporate limits. Defendant is a body corporate with its boundaries coinciding with those of the Plaintiff. Prior to September, 1952, the Plaintiff's sewer system served only approximately one-third of the city's homes and businesses. Plaintiff had no treatment plant, but treated the sewage in city owned septic tanks. On September 5, 1952, the electors of the city at a special election authorized the issuance of \$1,300,000 of water and sewer revenue bonds to provide for the construction of extensions and improvements to the city's water plant and sewer system. The sewer system was thereafter greatly expanded to serve most of the city's dwellings and commercial buildings, and a sewage treatment plant was constructed to treat sewage collected from the entire system.

After the system was extended, persons making connections thereto were charged a connection fee in accordance with a schedule adopted by city ordinance (See Section 3 of the attached copy of Ordinance 56 as amended for the connection fees being currently charged). Persons who were already connected to the system paid no such fee, but new and old connectors alike were and are presently required to pay a monthly service charge, the current rates

being shown in Section 2 of the attached copy of Ordinance 56 as amended. Defendant now has 10 school buildings and one administrative building connected to the Plaintiff's sewer system. The Defendant paid the monthly service charge of five cents per child until the Attorney General of Utah in an opinion issued on or about November 8, 1960, rules that the State of Utah was not obligated to pay fees for connection of a State owned building to a municipal sewer system. Upon the authority of that opinion the Defendant refused to pay for the service charges and connection fees, and the Plaintiff brought suit to recover all delinquent charges.

The service charges and connection fees collected by the Plaintiff are placed in a separate fund and used for the payment of operation and maintenance costs and the payment of principal and interest falling due on the revenue bonds issued to finance construction of the extension to the system in 1952. The balance remaining after the payment of those costs has been used in recent years to help finance capital improvements to the system, including expansion of the capacity of the treatment plant. However, in some former years the balance in the fund at the end of the year was transferred to the general fund of the city.

A copy of the Plaintiff's ordinance authorizing issuance of revenue bonds to defray the costs of extending the city's sewer and water system is at-

ached and made part of this statement of facts. Also, the pleadings of the parties hereto are incorporated herein and made part of this statement of facts.

ARGUMENT

POINT I.

SEWER CONNECTION AND SERVICE CHARGES ARE COMMERCIAL CONTRACTED CHARGES AND ARE THE SAME AS ANY OTHER CONTRACTED CHARGE AND ARE NOT "TAXES" OR "ASSESSMENTS" FROM WHICH A SCHOOL DISTRICT IS EXEMPT FROM PAYING UNDER THE CONSTITUTION OR STATUTES OF THE STATE OF UTAH.

The office of the Attorney General A. Pratt Kesler and his assistants, Roland G. Robinson Jr. and Ronald N. Boyce under date of March 12, 1962 in an opinion numbered #62-021 researched this question most thoroughly. The question as to whether these charges were "taxes" or "assessments" and whether the School District was exempt from payment of the same by construction of the Statutes of the State of Utah and its Constitution and existing cases were carefully considered. We shall quote extensively later on from that opinion inasmuch as it develops our position step by step. The opinion discusses 2 previous opinions of the Attorney General's office and why they were in error in holding for the position espoused by the Defendant Appellant.

Defendant suggests that since both parties are tax supported with co-existing boundaries, no taxpayer will suffer any detriment if the School Dis-

trict is exempt from payment of the service. Even if that were so, these facts will not apply except in this case because there are many cases where the boundaries are varied. The question should be held strictly to the liability to pay the charge. Such an accounting fiction as Defendants request would render it impossible to truly determine the costs of various governmental or taxing units. With the healthy bite school districts are taking from the tax apple, undoubtedly they or anyone similarly situated would like to shift some expenses elsewhere. Also, why not say they should be exempt from paying charges for lights, heat, supplies, etc. The source providing the service is not the important question, it is whether or not it is a contractual arrangement the same as any other purchases by the School District.

If a School District was not required to pay for lights, gas, water, sewer or other services, those municipalities, persons, or corporations providing the same would surely see that they were not made available unless they were to be compensated as from other recipients. Can we require services to be provided gratuitously without taking property (value) from one and giving it to another? Supposing private capital provided these services, could we require gratuitous services for the School District?

Now, let us proceed with the opinion of the Utah Attorney General #62-0211.

“The question presented is whether a school

district may be held to pay for the actual cost of connecting to a sewer line of a sewer district, and whether it may be charged for the services that are provided. Article XIII, Section 2, of the Utah Constitution provides:

“The property of the state, counties, cities, towns, *school districts*, municipal corporations and public libraries * * * shall be exempt from taxation.”

Section 59-2-1, U.C.A. 1953, also provides:

“The property of the United States, of this state, counties, cities, towns, *school districts*, municipal corporations * * * shall be exempt from taxation.”

It appears clear, therefore, that the property of school districts is not subject to tax. In addition, Section 53-4-12, U.C.A. 1953, provides that school board property is exempt from special assessment. The matter thus resolves itself into a question of whether the payment of connection fees and sewer service charges are taxes or special assessment. If they are, they may not be assessed against the school districts; if they are not, the school district can be compelled to pay:

1. Two opinions previously issued by the office of the Attorney General have held that such charges are taxes and hence cannot be imposed. (Nos. 60-072 and 60-029.)

The only pertinent case cited in these opinions is the case of *State ex rel, Board of Education of Salt Lake City v. McGonagle*, 38 Utah 277, 112 Pac.

401 (1910) cited in No. 60-072. In this case, the Board of Education brought a mandamus action against the Salt Lake City Engineer to compel him to allow the Board to connect a school building with a city sewer. The City Engineer had refused to issue the permit until the City paid a special assessment levied against the school property for the construction of the sewer. In this case, the School Board tendered the connection or permit fee; 38 Utah 277 at 278, the Court said:

“We think it equally clear that the lands owned by the Board are exempt from local assessment or special taxation for the construction of a public sewer * * *”

The basis of the court's opinion was that this constituted a tax. The decision was based on a similar holding of the court in *Wey vs. Salt Lake City*, 35 Utah 504, 101 Pac. 381, holding assessments for street improvements to be invalid. Both of the decisions relied upon Comp. Laws of Utah, 1907, Sec. 1933, which is the same as Section 53-4-12, U.C.A. 1953, which provides.:

“All property real and personal held by any board of education shall be exempt from general and special taxation, and from all local assessments for any purpose, and no such property shall be taken in any manner for debts.”

Thus, the cases were concerned with a particular statute exempting the property of school districts from special or general taxation, but not with the question of connection fees per se, since in the

case before the court the fee was tendered, However, as to connection charges it was said:

“It, however, is urged, that though the property was exempt and the assessment invalid still, the city being the owner of the sewer, could lawfully impose the payment of a reasonable charge before it was required to permit the board to connect with or use the sewer and that the payment of ninety-eight dollars, the amount of the assessment by the board for the use of this sewer was a reasonable charge. The legislature has seen fit to exempt all property of the board, both real and personal, from special taxation and all local assessments, for any purpose. Since the property was not subject to the assessment, and the levy for that reason invalid and the assessment unenforceable, to then permit the municipality to impose as a condition of tapping and making a connection with the public sewer the payment of a charge for the use of the sewer, is to allow the municipality to do indirectly what it cannot do directly. (State ex rel. Dunner vs. Graydon, 6 Ohio Cir. Ct. R. 634, Meyler vs. Meadville, 23 Pa. Co. Ct. R. 119.)

The case is not clear as to whether the court was in effect saying you cannot disguise a tax as a connection charge, or whether it was saying that the charges of any kind could not be imposed. It is certain that the opinion did not deal with day-to-day reasonable service charges necessitated by the connection. It appears more suggestive from the language of the court that it was an attempt to do “indirectly what could not be done directly,” that

the court was concerned with fraud or sham and not actual related expenses. The briefs filed in the case have apparently been lost, nor are copies of the two decisions relied upon by the Supreme Court available in the State Law Library. It seems more likely, however, that the decision only purported to cover taxation.

2. The Utah Supreme Court recently decided in *State vs. Salt Lake City Public Board of Education*, Case No. 9492, January 5, 1962, that the state must pay compensation for taking of school board property for highway use. Analogous to that case is the situation of sewer and water districts, since if a school board were allowed to compel connection with a sewer line and use its capacity or require an expanded capacity, it would in effect be sanctioning the taking of the property or money of a sewer district without compensation therefor.

3. It is submitted that the Utah Supreme Court has not directly decided the question of whether the actual costs of connection and a reasonable service charge, directly related to the actual expenses incurred in providing the sewer facility, may be charged by a sewer district against a school district. Section 17-6-3.8, U.C.A. 1953, provides:

“Without in any way limiting the powers hereinabove reposed in districts created under this act, it is expressly provided that each such district shall have:

* * *

(c) The power to enter into such contracts

as are considered desirable by the board to carry out the functions of the district, including specifically the power to enter into contracts with municipal corporations, or other public corporations, or district, and any county municipal corporation, or any other public corporation or districts, shall have the power to enter into contracts with districts created under this act for the purpose of constructing, acquiring or operating all or any part of a system for the collection, treatment and disposition of sewage. * * *

(d) The power to impose and collect charges for water or other services or facilities afforded by the district to its consumers and to pledge all or any part of the revenues so derived to the payment of any bonds of the district. * * *

It would appear that the Legislature intended that water and sewer districts be allowed to enter into contracts with public districts (school districts) and to charge for their actual services. If so, the Legislature could hardly have intended Section 53-4-12, U.C.A. 1953, to have acted as a cloak of immunity since it would be inconsistent with what is expressed and implied by Section 17-6-3.8, U.C.A. 1953. Therefore, it may be said that the legislative intent was to allow reasonable service charges to defray actual expenses.

As noted before, no judicial decision by the Utah Court has been rendered on this exact problem; the McGonagle case notwithstanding. In addition, the McGonagle case was decided before Sec-

tion 17-3-3.8, U.C.A. 1953, was enacted. Laws of Utah, 1953, Ch. 28, Sec. 2.

It is further submitted that the great weight of legal authority is against the proposition urged by the previous Attorney Generals' opinions. The general rule is noted in 64 C.J.S., Municipal Corporations, Sec. 1805, p. 273:

"A charge for the use of or connection with a sewer system has been held a charge for special benefits received, or a method of paying for the construction. Such a charge, or a charge for sewer services, or a rental charge is under most authorities not a tax or an assessment."

Thus, if this is a correct statement of law, Section 53-4-12, U.C.A. 1953, offers no objection to the charge of a reasonable rental. Other authorities are in accord. In 9 Comp. Gen. 41 (1929), the Comptroller General of the United States ruled that the City of Portland could charge the United States for the privilege of a VA Hospital connecting on to a city sewer system, and ruled that the same was not a tax. It was said:

"The amount charged to the Government for the privilege of connecting with the city sewer cannot be said under the above definition (citing 123 U.S., 288) to have been in the nature of a tax."

The same ruling resulted concerning the right of the U.S. Indian Agency to connect to the City of Albuquerque; 29 Comp. Gen. 120 (1949). Subse-

quently, in 31 Comp. Gen. 405, 408 (1952), it was stated:

“It has been held that the Constitutional immunity of the Federal government from state and local taxation does not extend to payment of charges for water or sewer services where the amount thereof is determined pursuant to statute by the quantity of water furnished or the amount of sewage disposed of, such charges being neither regarded as taxes or assessments, but as the price of the product or service rendered.”

This is also in accord with the general statement found in 64 C.J.S., Municipal Corporations, Sec. 1805, p. 273, where it is said:

“A distinction has been made between the actual use of the facilities with knowledge of the rates charged, in which case the charges are not taxes, or a substitute for taxes, and not an exercise of the taxing power, but an obligation resting on contract, and the imposition of a charge with no regard to the extent or value of the use made of the sewer facilities or whether any use is made, in which case the charge is in legal effect a tax, the obligation to pay it being created only by the exercise of the taxing power.”

The cases from the great majority of jurisdiction support this conclusion. Thus, in *Schmidt vs. Village of Kimberly*, 256 P. 2d 515 (Ida. 1953), it was said:

“The charges made for water and sewer service are not taxes.”

The New Hampshire Supreme Court in *Opi-*

nion of Justices, 39 A 2d 765 (1944) said:

“In accordance with the weight of authority, we hold that sewer rents imposed by the City of Concord are neither taxes nor assessments for a local benefit but, like water rates are charges made for a service rendered—charges which the consumer, by accepting the service, impliedly agrees to pay.”

The Court further said:

“This rule is not restricted to private consumers but extends unquestionable to the State where the officials who accept the service have the power to act in the matter.”

See also *Town of Port Orchard vs. Kitsop County*, 141 P. 2d 151, (Wash. 1943), (implied power to require county to pay “reasonable fee”).

In *Grim vs. Village of Lewisville*, 54 Ohio App. 270, & N.E. 2d 998, it was held that such sewer charges were not “special assessments”.

The same result was recognized in *Louisville vs. Joseph Seagrams & S.*, 307 Ky. 413, 211 S.W. 2d 122 (1948). The court said:

“All of the authorities agree that special charges of this kind are not taxes, but rents for the use of sewers, or in some instances but a method of paying for their construction.” (Citing authority).

In *Louisville vs. Barker, County Judge*, 307 Ky. 655, 212 S.W. 2d 122, (1948), the Kentucky Court of Appeals, in construing a statute similar to Section 17-6-3.8, U.C.A. 1953, as against a claim of immunity by the county, said:

“The scope of the power delegated by the Legislature to the District in this particular is all embracing. It is authorized not only to fix or establish a schedule of rates and charges, but to collect them ‘from all the real property served by the facilities.’ KRS, 76.090(1). There is no exemption or exclusion of any property of the county. To say that the county’s property is excluded we would have to read into the statute something that the Legislature did not put into it. As we have pointed out, sewer rental charges are not taxes or special assessments, but possess commercial characteristics. Therefore, there is no apparent reason to construe the completely comprehensive language as not meaning just what it says, under general conceptions of a lack of power of one governmental agency to impose burdens on another in the absence of a positively expressed right.”

See also; *Sanitation District No. 1 of Jefferson County vs. Campbell*, 249 S.W. 2d 767 (1952 Ky.); *Vasil vs. Louisville, et al*, 303 Ky. 248, 197 S.W. 2d 413 (1946).

In *State vs. Taylor*, 79 N.E. 2d 127 (1948), the Ohio Supreme Court said:

“This case does not present a situation where the city is endeavoring to tax property belonging to the State of Ohio, since it is well established that charges for sewer services, or so-called rental charges are neither taxes nor assessments.”

Other cases would merely make excessive the length of the memorandum, but several other cases

have followed the above precedents. See: *Repperger vs. City of Grand Rapids*, 338 Mich. 682, 62 N.W. 2d 585 (1954), (Sewer charges not a tax); *Oliver vs. Water Works and Sanitary Sewer Board*, 73 So. 2d 552 (1954, Ala.); *In Re Philadelphia*, 340 Pa. 17, 16 A.2d 32 (1940); *Patterson vs. City of Chattanooga*, 241 S.W. 2d 291 (Tenn., 1951); *Waterworks and Sanitary Bd. vs. Dean*, 69 So. 2d 704 (1954, Ala.); *Laverents vs. Cheyenne*, 217 P.2d 877 (1950, Wyo.); *Michelsen vs. City of Grand Island*, 48 N.W. 2d 769 (1951).

4. The only important opinion of the Attorney General is No. 60-072, since it is the only opinion purporting to concern itself with the exact problem. The error in this opinion is first, it fails to consider the effect of Section 17-6-3.8, U.C.A. 1953, or whether that statute has overruled the McGonagle case; second, it assumes that connection fees are assessments based on the McGonagle language which is not directly pertinent; and third, the opinion does not consider whether day to day service charges or reasonable rentals may be charged, nor does the McGonagle case.

It is the opinion of this office, for the reasons here set forth, that payment of both reasonable connection fees and reasonable rental and service charges for sewer service may be required of school districts."

CONCLUSION

Based upon the foregoing authorities and analysis of the facts and the relationship between the parties it is the Respondent's contention that the Defendant's should be required to pay for sewer services the same as if it were any other utility or contractual relationship between strangers. Surely the law adequately provides for the raising of revenues to supply school districts and it is not necessary that they rely on enforced charitable contributions whether from another tax supported body or from any individual or corporation.

Respectfully submitted,

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